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In the Supreme Court of the United States

OCTOBER TERM, 1955

No.

THE UNITED STATES, PETITIONER

v.

AUBREY H. BOND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above cause on March 6, 1956.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. 23–26) is reported at 135 F. Supp. 433.

JURISDICTION

The opinion of the Court of Claims directing that entry of judgment be suspended pending the determination of the exact amount due to respondent (App. A, *infra*, p. 26) was entered on November 8, 1955. A timely motion for a new trial was denied on January 31, 1956 (App. A,

infra, pp. 26–27). Judgment was entered on March 6, 1956 (App. A, *infra,* pp. 27–28). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

A retired Army officer, who was subject while on active duty to the non-contributory Army retirement system and now draws military retirement pay, served in the Army for a period in excess of the span of thirty years and one day necessary to qualify him for his highest military retirement pay. Prior to his Army service, he served for a time in the federal civil service, but he has never made, or been required to make, any contribution to the Civil Service Retirement Fund.

The question presented is whether such a person can obtain a civil service annuity by combining his "excess" period of military service together with his period of non-contributory civilian service so as to form a bloc of years sufficient for an annuity under the Civil Service Retirement Act.

STATUTES INVOLVED

Sections 3 and 5 of the Civil Service Retirement Act and the pertinent parts of Section 511 of the Career Compensation Act of 1949 are set forth in Appendix B, *infra,* pp. 35–37.

STATEMENT

1. The statutory background

a. *Civil Service Retirement.* The Civil Service Retirement Act of 1920, as amended (5 U. S. C. 691 *ff.*, referred to as the Act), establishes a partly contributory retirement system.[1] Pursuant to Section 3 of the Act, App. B, *infra*, p. 35, the Civil Service Retirement System covers "all officers and employees in or under the executive, judicial, and legislative branches of the United States Government * * *" except those *"subject to another retirement system for such officers and employees of the said government* * * *" (emphasis added).

The annuity payable under the Act is computed by multiplying 1½ per centum of the employee's annual salary[2] times the years of service (Section 4 of the Act, 5 U. S. C. 698). The period of service is computed from the date of original employment in the civil service of the United

[1] S. Rept. 99, 66th Cong., 1st Sess., p. 4; H. Rept. 120, 66th Cong., 1st Sess., pp. 3-4. The contributions which originally amounted to 2½ per cent of pay (Section 8 of the Act of May 22, 1920, 41 Stat. 618) now amount to 6 per centum. Section 10 of the Act, 5 U. S. C. 719. No deduction is required for services rendered prior to August 1, 1920, or for periods of honorable service in the armed forces. Section 9 of the Act, 5 U. S. C. 736b, see *infra*, p. 16, fn. 9, and pp. 18–19.

[2] More exactly: "the average annual basic salary * * * received by the officer or employee during any five consecutive years of allowable service at the option of the officer or employee" (Section 4 of the Act, 5 U. S. C. 698).

States; it includes "periods of honorable service in the Army, Navy, Marine Corps, or Coast Guard of the United States" except that "in the case of an officer or employee * * * who is eligible for and receives retired pay on account of military or naval service, *the period of service upon which such retired pay is based shall not be included* * * *." (Section 5 of the Act, App. B, *infra*, pp. 35–36).[3]

b. *Military Retirement.* Pursuant to the Career Compensation Act of 1949, Section 411 (63 Stat. 823, 37 U. S. C. 281), a member of the armed forces, previously retired for physical disability, may elect to receive either (a) *disability retirement pay* pursuant to Section 402 (d), 37 U. S. C. 272 (d), or (b) *retirement pay* computed pursuant to one of the two methods contained in Section 511 (63 Stat. 829, 37 U. S. C. 311).

(i) *Disability retirement pay.* According to Section 402 (d) of the Career Compensation Act (63 Stat. 818–819, 37 U. S. C. 272 (d)), a member of the armed forces retired for disability has two options for the computation of his disability retirement pay. Under the first option, 2½ per cent of the officer's monthly basic pay at the time of his retirement is multiplied by the number of the years of his service—one half year or more of

[3] As we shall show in more detail (*infra*, pp. 17–19), service antedating the passage of the Act can be considered only if the officer or employee has service covered by the Act after its effective date.

service to be counted as a whole year. Under the second option, the monthly base pay is multiplied by the percentage of the officer's physical disability. Under neither option may the disability retirement pay exceed 75 per centum of the basic pay.[4]

(ii) *Retirement pay.* Pursuant to Section 511 of the Career Compensation Act of 1949 (63 Stat. 829, 37 U. S. C. 311, *infra*, pp. 35–36), a retired officer also has two options for computation of his retirement pay. He may elect to continue to receive the retirement pay he was receiving at the time of the effective date of the Career Compensation Act, or he may have his retirement pay computed by a formula substantially identical with the first option governing disability retirement pay (*supra*, pp. 4–5)—2½ per cent of the officers highest salary is to be multiplied by the number of years of service (fractions of one half year or more of active service to count as a full year). Active service in this context means "all service as a member or as a former member of the uniformed services * * *." Again, under either option the retirement pay may not exceed 75 per centum of the basic pay upon which the computation is based.

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[4] This ceiling of 75 per cent of the active pay goes back at least as far as the Revised Statutes (R. S. 1274).

2. The facts

Respondent is a retired Army colonel (App. A, *infra*, pp. 23–24). He served as a classified civilian employee in the War and Interior Departments from September 15, 1909, to September 9, 1915, *i. e.*, for 5 years, 11 months and 24 days (App. A, *infra*, pp. 23–24). On October 24, 1917, he was commissioned in the Army where he served for a period of 30 years, 5 months and 8 days, until March 31, 1948. On that day, he was retired with the rank of colonel for a service-incurred disability (App. A, *infra*, p. 24). His monthly retirement pay under the law then in effect amounted to $412.50 (R. 151).

After the enactment of the Career Compensation Act of 1949, respondent elected to have his retirement pay computed pursuant to the second option of Section 511. According to this formula (*supra*, p. 5), he was entitled to—and received—2½ per cent of $726.18, monthly pay of a colonel with more than thirty years of service,[5] multiplied by 30, the length of his entire active service (since he had served less than six months in excess of thirty years). Respondent's monthly retirement pay thus amounted to $544.64 under the new formula.

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[5] Career Compensation Act, Section 201, 63 Stat. 806, 37 U. S. C. (1952 Ed.) 232. (R. 64) These rates have been increased by the Act of March 31, 1955, § 2 (1), 69 Stat. 18.

3. The pleadings

Respondent brought suit in the Court of Claims urging that he is entitled, in addition to his military retirement pay, to a civil service retirement annuity based upon the 5 years, 11 months, and 24 days of his pre-1920 civil service—as to which he has never made any contribution to the Civil Service Retirement Fund, see fn. 1, *supra*, p. 3—and the 5 months and 7 days of the military service which he served in excess of thirty years and one day. His contention was that since his military retirement benefits did not increase after he had served for thirty years and a day, because of the 75 per cent ceiling and the fact that the highest basic pay is for "over thirty years,"[6] his subsequent military service was not "subject to the military retirement system,"[7] and the "extra" five months and seven days did not constitute "a period of service upon which his retired pay was based."[8] Accordingly, he argued that his service during this period—although military

[6] Career Compensation Act, Section 201 (63 Stat. 806, 37 U. S. C. 232) (R. 64). The officer becomes entitled to this pay grade on the first day following the completion of the thirtieth year of service (*Lambert* v. *United States*, 121 C. Cls. 333). For the possibility of an increase of retirement benefits as the result of a promotion see, however, *infra*, pp. 14–15.

[7] Cf. Civil Service Retirement Act, Section 3, 5 U. S. C. 693, *supra*, p. 3.

[8] Cf. Civil Service Retirement Act, Section 5, 5 U. S. C. 707, *supra*, p. 4.

in nature—was not excepted from the Civil Service Retirement Act, and entitled him to a civil service annuity based also on his pre-1920 civilian service.

The Government took the position that respondent had been subject to the military retirement system during the entire period of his military service and that his retirement pay was based upon the entire length of service, even, if due to the 75 per cent ceiling, it did not, as a matter of fact, increase after his completion of thirty years of service. It was also pointed out that Congress intended to cover career military service exclusively by the military retirement system.

4. The decision below

After claimant's motion for judgment on the pleadings (R. 11) and the Government's cross-motion for summary judgment (R. 22), the Court of Claims, adhering to its earlier decision in *Prentiss* v. *United States*, 123 C. Cls. 225 (App. A, *infra*, pp. 28–34), decided in favor of respondent. In *Prentiss*, which involved a similar situation, the Court of Claims had ruled in favor of the claimant, although admitting that "the statutory ensemble is perplexing" and that the statute was "ambiguous" (App. A, *infra*, p. 32).[9] Chief

[9] We did not apply for a writ of certiorari in *Prentiss* mainly because, in our view, the issues had not been thoroughly enough presented to the Court of Claims in that case.

Judge Jones dissented here, as in *Prentiss* (App. A, *infra,* pp. 33–34), where he had pointed out that an officer should not be permitted to:

> * * * draw military retirement on just enough military service to get his highest retirement, apply the excess military service to splice out and afford civilian retirement for which he could not otherwise qualify, and draw both on that basis.
>
> * * * But I do not believe it was the intention of Congress that he might split up the term of his military service in order to qualify for both systems of retirement.

REASONS FOR GRANTING THE WRIT

In adhering to its decision in *Prentiss* v. *United States,* 123 C. Cls. 225 (App. A, *infra,* pp. 28–34), the Court of Claims has decided an important, and to it "perplexing", issue under the Civil Service Retirement Act. The court has granted an annuity under the contributory Civil Service Retirement System to an individual who has never been called upon to contribute to that system and who now receives the full benefits of another federal retirement program. This curious result has been achieved by using the period of service in excess of that needed to qualify under the other system as the basis for coverage under the civil service system, and then combining that "excess" period with a span of civilian federal employment as to which no

contributions have been made into the Civil Service Retirement Fund. The result is an additional pension, wholly gratuitous, to be paid at the expense of those federal employees whose contributions help to make up the Fund. In the *Prentiss* and instant cases, the court's ruling has been applied to Army officers subject to the military retirement system who happen also to have some non-covered pre-1920 civilian service, but the decision's rationale can easily be applied to other military personnel, as well as to the large number of temporary federal employees who have been subject to the Social Security System and do not contribute to the Civil Service Retirement Fund. The immediate and potential impact of the court's erroneous ruling warrant its review and correction by this Court.[9a]

1. Despite its concession that the statutory "ensemble" is "perplexing" and "ambiguous", the court below has granted retirement benefits under a contributory system to persons who never made any contributions and for whom the Government has made other generous and gratuitous retirement provisions. *Prentiss* and the decision below are thus in marked contrast with *Olney* v. *United States,* 123 C. Cls. 285, certiorari denied, 344 U. S. 898, decided on the same day

[9a] See *Moncrief* v. *Folsom, Secretary of the Department of Health, Education, and Welfare*, C. A. 4, No. 7112, decided April 9, 1956, in which Chief Judge Parker, dissenting, states that the majority opinion is contrary to the principle adopted by the Court of Claims in the *Bond* and *Prentiss* cases.

as *Prentiss,* where the Court of Claims held that in the case of an ambiguity the Retirement Act should not be construed so as to permit such a windfall (see 123 C. Cls. at 299, 301). Moreover, we believe that there is no ambiguity in the legislation and that the error in the decision below is apparent.

a. According to the basic coverage provision of the Civil Service Retirement Act, Section 3, App. B, *infra*, p. 35, "all officers and employees" of the Government are covered by the Act *except* those who are "subject to another [governmental] retirement system." Respondent is concededly a beneficiary of the military retirement system. It would follow from a plain and unaffected reading of the Act that he is therefore "subject to another retirement system" and his military service is in no way covered by the Civil Service Retirement System.

The court below, however, following respondent's suggestion, complicated this simple statutory plan by placing an unwarranted gloss upon the term "subject to another retirement system." The argument is that, inasmuch as military service after his thirtieth year did not increase respondent's military retirement benefits, he was not, with respect to that "excess period," *subject* to the military retirement system. The simple word "subject" is contorted into meaning "performs such services as will result in increased benefits under another retirement system." There is

nothing to support this strained interpretation; rather, it is clear that the *proviso* was expressly and simply designed to except from the civil service system those persons, like Army officers, whose service is covered by another federal program.

Prior to 1942, a retired career soldier could not possibly make the contention respondent is making now. Up to then, the Civil Service Retirement System was limited to enumerated groups of government employees, which did not include career soldiers.[10] The Act of January 24, 1942, 56 Stat. 15, amended Section 3 (App. B, *infra*, p. 35) so as to include all officers and employees of all three branches of the Government except those who were subject to another governmental retirement system. It is evident from the legislative history of that amendment that Congress considered career military personnel adequately provided for under their own retirement system, and that the change was not intended to bring any period of career military duty within the Civil Service Retirement System. The pertinent committee reports both state that "coverage will not apply to those already subject to another retirement act."[11] As examples of such other retirement systems the reports point to the Foreign Service Retirement System, and stress the fact

[10] Cf. Act of May 29, 1930, Section 3, 46 Stat. 470.

[11] S. Rept. 921, 77th Cong., 1st Sess., p. 4 (R. 75–76) and H. Rept. 1285, 77th Cong., 1st Sess., pp. 3–4.

that officers of the armed forces "receive 75 per cent of their final pay at the time of retirement." Again, when during the debate in the Senate Senator McKellar voiced a fear that, as the result of the amendments, Army or Navy officers might receive annuities under the Act without having made any contribution to the Civil Service Retirement System,[12] Senator Byrd, a member of the subcommittee which had been in charge of the bill, stated categorically (88 Cong. Rec. 457):

> * * * The Senator's reference to Army and Navy officers has no significance because they are not under the retirement system.

Congress thus left little doubt that it intended completely to except career military service from the coverage of the Civil Service Retirement System.

b. In addition, a necessary corollary of respondent's claim is that his military retirement pay is not based upon the entire period of his military service but only on the first thirty-years-plus-one-day. This position is in direct conflict with the statutory language. According to the Career Compensation Act, Section 511, App. B, *infra*, pp. 36–37, his retirement pay is not founded

[12] According to Section 9 of the Act no contributions are required for periods of honorable military service. *Supra*, p. 3, fn. 1.

on his first thirty years but, subject to the 75 per cent ceiling, upon the "number of years of active service creditable to him" and "active service" means "*all* service as a member or as a former member of the uniformed services * * *"[13] [emphasis added].

Nor can it be said that respondent's retirement pay became absolutely frozen on the day following the completion of his thirtieth year of service. A subsequent promotion in rank would have increased his base pay and consequently his retirement pay. If, following the court below, we consider as "excess periods" all that time with respect to which a retired officer did not *as a*

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[13] The argument that the 75 per cent ceiling on retirement pay is based upon 30 years of service, each of which entitles the officer to 2½ per cent credit toward retirement, apart from being refuted by the statutory language, puts the cart before the horse. Under R. S. 1274, 10 U. S. C. (1946 Ed.) 971, which was in force until repealed by the Career Compensation Act of 1949, retirement pay was uniformly 75 per cent of the pay of the rank at which the officer retired, regardless of the ground of retirement which could have been physical disability, age, or length of service (40 years of service (R. S. 1243), 30 years of service (R. S. 1243), 45 years of service (R. S. 1244)). The concept of 2½ per cent credit per year of active service is of much more recent origin. It seems to have been utilized first in the Act of June 4, 1920, Section 24b, 41 Stat. 773; note, however, that under Section 24 of the same Act (41 Stat. 771) certain officers were given 4 per cent credit per annum. In either case, retirement pay was subject to the 75 per cent limit. And as we have shown, *supra*, pp. 4–5, the same ceiling applies to retirement pay, based upon the percentage of disability, a factor which bears no relation whatever to the length of service.

matter of fact get an increase in retirement pay, an utterly unworkable interpretation of the statute results. If a colonel were promoted to brigadier general after 34 years of service, he would have been, according to the court's theory, outside the military retirement system for four years, subjected to it retrospectively upon his promotion, and outside of it again until his final retirement, unless he received another promotion. An interpretation of the Act under which coverage for a given period cannot be determined in advance or at least currently is not likely to be correct.

Moreover, the notion that a period of service is "subject" to the retirement system only if there is a commensurate increase in retirement benefits would not be limited to service in excess of thirty years; it would apply to the service of virtually every retiring career soldier. As we have noted, *supra,* pp. 4–5, retirement benefits are not computed on the actual days of service, but increase in brackets depending on the biennial or quadrennial increases in base pay [14] and the years of service, fractions of a year to be counted as a full year.[15] A colonel retiring after 29 years and 180 days of service receives exactly the same retirement benefits as a colonel retiring after 28 years and 190 days. Under respondent's theory, those 355 days of military duty are "excess" serv-

[14] Cf. Career Compensation Act, Section 201, 63 Stat. 806, as amended 37 U. S. C. 232. R. 64.

[15] Career Compensation Act, Section 511, *infra*, pp. 36–37.

ice subject to the Civil Service Retirement System.

c. Similar considerations apply to the argument that the last 5 months and 7 days of respondent's military service were not "a period of service upon which his retired pay was based" within the purview of Section 5 of the Civil Service Retirement Act (App. B, *infra*, p. 36), and may therefore be counted toward a civil service annuity. First it should be noted that one can reach Section 5, which deals with creditable service, only after it has been determined that the retiring officer or employee is actually covered by the basic Section 3 of the Act.[16] Respondent does not fall in that category (*supra*, pp. 11–13). In any event, as we have also shown (*supra*, pp. 13–16) his retirement pay is based, according to the very words of the statute, upon the entire length of his military service.

d. The notion of "excess" military duty and its rejection for civil service purposes are not novel. Similar contentions, made shortly after

[16] The purpose of Section 5 is plain. It deals with government employees who come within the coverage of the Act by virtue of Section 3. Some of these officers or employees are civil service employees who were non-career soldiers and not entitled to military retirement benefits. They are credited for their military service if they had at least five years of civilian service. On the other hand, civil service employees who had been career soldiers and thus are receiving military retirement benefits are not entitled to credit for such career military service.

the Civil Service Retirement Act had gone into effect, were rejected administratively by the Department of the Interior, then in charge of the administration of the Act, on the ground that "the whole period of his military service formed the basis for the Army retired pay." Cf. *George Miner*, 22 Decisions of the Department of Interior in Appealed Pension and Retirement Claims 79, 80–81 (1925) (R. 44–45);[17] see also *Albert S. Goff*, 22 *ibid.* 268, 271 (1927). The many subsequent amendments and reenactments of the Act carry with them the approval of this administrative interpretation of the statutory language. *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Commissioner* v. *Flowers*, 326 U. S. 465, 469; *Shapiro* v. *United States*, 335 U. S. 1, 16; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 545.

2. The fact that respondent had some years of civilian service prior to the enactment of the Civil Service Retirement Act in 1920 clearly does not grant him coverage. The Act has been interpreted consistently as permitting credit for pre-1920 service only if the employee was separated from a position covered by the Act subsequent to its effective date.[18] Thus, pre-1920

[17] "The argument in support of the appeal is purely technical and ignores the broad general policy indicated in this and analogous legislation against granting dual benefits for one service."

[18] See *e. g.*, 36 Op. A. G. 495, 497.

service may be credited to an employee if he had some post-1920 civilian service or military service covered by the Act, *i. e.*, service not subject to another retirement system.[19] But pre-1920 service cannot, in itself, provide the basis for coverage.[20]

This established and accepted interpretation is wholly reasonable and does not result in any undue discrimination against career soldiers. First, the latter are covered by the military retirement system which is far more generous than civil service retirement.[21] Moreover, the reason for giving an employee retiring after 1920 credit for his pre-1920 service lies in the compulsory retirement aspects of the Act, one of the purposes of which was to remove superannuated employees from the federal payroll.[22] Humanitarian considerations required that those

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[19] The Act of August 31, 1954, 68 Stat. 1004, amending Section 5 of the Act (5 U. S. C. 707), now requires at least one year of creditable civilian service within the two-year period immediately preceding retirement.

[20] In its opinion in *Prentiss*, the Court of Claims does not appear to dispute this contention. The court finds coverage in the post-1920 "excess" military service (see App. A, *infra*, p. 32).

[21] As we have pointed out, *supra*, pp. 4–5, under the noncontributory military retirement system respondent received 2½ per cent credit for each year of service. Under the civil service system an employee who has made substantial contributions receives only 1½ per cent credit per year of service.

[22] S. Rept. 99, 66th Cong., 1st Sess., pp. 2–3; H. Rept. 120, 66th Cong., 1st Sess., pp. 1–2.

who retired during the first years after the Act went into effect should be given benefits measured by the entire length of their service, and not merely by the short time following the effective date of the Act during which they made contributions to the retirement fund. As in any transitional measure regulating the initial stages of a retirement system, windfalls which cannot be shared by all are inescapable.[23]

3. As we have already noted, the importance of these issues is not limited to the case at bar. The Civil Service Commission advises that seven claims similar to those of the respondent have already been presented to it; we do not know how many more instances there may be, particularly of persons who serve a few years in the civil service and then join the career armed services. Moreover, as we have shown (*supra*, pp. 15–16), the principle, squarely accepted by the Court of Claims, that a period of service is not covered by a retirement system unless as a matter of fact it increases the officers' benefits, has wide-ranging potentialities for all career military personnel.

Serious consequences of the court's holding may also arise with respect to the many thousands of temporary government employees who are cov-

[23] Cf. Larson, *Payments and Pensions*, New York Times Book Review, April 8, 1956, p. 28. The Act of August 31, 1954, 68 Stat. 1004, *supra*, p. 18, fn. 19, seeks to remedy some of the abuses which have come to the attention of Congress.

ered by, and pay contributions to, the Social Security System rather than to the Civil Service Retirement Fund.[24] Under social security, the benefits cease to increase after the employee has become a "fully insured individual" *i. e.*, after 40 quarters of coverage, and if his earnings exceed $4,200.00 (Social Security Act, Sections 214, 215, as amended, 42 U. S. C. (1952 Ed., Supp. II) 414, 415). It may be argued with the logic of the ruling below that a temporary government employee who has more than 40 quarters of social security coverage, and who earns more than $4,200 per annum, is no longer subject to the Social Security Act, and is thus entitled to civil service retirement benefits.[25] Similarly, it can be contended that non-career veterans of World War II and the Korean episode who take temporary government jobs (subject to the Social Security Act) can combine their military service with their civilian government employment—as to neither of which are contributions made to the Civil Service Retirement Fund—to secure a civil service annuity. The rationale of the Court of Claims' opinion supports such otherwise unfounded claims.

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[24] The contributions to the Social Security System are far lower than those to the Civil Service Retirement System. It is estimated that some 350,000 federal employees are now covered by the Social Security System.

[25] According to Section 9 of the Civil Service Retirement Act (5 U. S. C. 736b), his benefits merely would be reduced by 10 per centum.

CONCLUSION

For the above reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
GEORGE COCHRAN DOUB,
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PAUL A. SWEENEY,
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Attorneys.

APRIL 1956.

APPENDIX A

In the United States Court of Claims

No. 390–54

(Decided November 8, 1955)

AUBREY H. BOND

v.

THE UNITED STATES

Mr. A. M. Prentiss for the plaintiff.

Mr. Lawrence S. Smith, with whom was Mr. Acting Assistant Attorney General Joseph D. Guilfoyle, for the defendant.

ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND TO AMEND PLEADING AND ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

LARAMORE, *Judge*, delivered the opinion of the court:

The case involves the claim of a retired Army officer, drawing military retirement pay, to an annuity under the Civil Service Retirement Act of May 29, 1930, as amended, 46 Stat. 468, 5 U. S. C. § 691 (1946 Ed.).

Plaintiff is a retired Army officer, currently drawing disability retirement pay. He served as a civilian employee in the Departments of War and Interior for 5 years 11 months and 24 days during the period September 15, 1909, to Sep-

tember 9, 1915. He was commissioned in the Army on October 24, 1917, and served until March 21, 1948, a period of 30 years 5 months and 8 days. Effective March 31, 1948, plaintiff was retired from active military service on account of a disability incident thereto and has been drawing military retired pay since that date, based on number of years of service under the provisions of the Career Compensation Act of 1949, 63 Stat. 802.

Plaintiff's military retired pay is currently $544.64 per month, which is the equivalent of 75 percent of $726.18, the monthly basic pay of a Colonel with over 30 years of service.

Plaintiff claims that he is entitled to an annuity under the Civil Service Retirement Act, *supra*, based on 5 years 11 months and 24 days of civilian service in the War and Interior Departments, plus 5 months and 8 days of military service, making a total of 6 years 5 months and 2 days. As to this latter service, plaintiff contends that his military retirement pay is based upon the first 30 years of service in the Army, and that the remaining 5 months and 8 days over and above the first 30 years is "excess service" which can be added to the 1909 through 1915 civilian service. The addition of the "excess" military service to the earlier civilian service, which took place before the Civil Service Retirement Act, was originally passed in 1920, is relied on to bring plaintiff under the Act thereby entitling him to an annuity.

The case is submitted on plaintiff's motion for summary judgment, defendant's cross motion for summary judgment, together with motion

of plaintiff for leave of court to amend his petition.

Plaintiff's claim is grounded upon this court's decision in *Prentiss* v. *United States,* 123 C. Cls. 225, wherein it was held that a plaintiff similarly situated was entitled to an annuity comparable to that sought in the instant case. It is defendant's position that the decision in the *Prentiss* case was erroneous, that said decision is in conflict with the court's decision in the case of *Lambert* v. *United States,* 121 C. Cls. 333, and that it should be overruled.

We can find no conflict between the *Prentiss* case and the *Lambert* case. The issue in the *Lambert* case was whether or not a Colonel of the Army, who had served exactly 30 years on active duty, was entitled to retired pay based on 75 percent of the maximum active service pay of his grade. This is not the situation in the case at bar. Here plaintiff admittedly actively served 30 years 5 months and 8 days before retirement. In the *Lambert* case this court held that to be entitled to pay based upon the active pay of a Colonel with more than 30 years of active service, plaintiff must have actually entered upon the 31st year of active service. In the instant case plaintiff actually entered upon the 31st year of active service on October 25, 1947 the day following completion of his first 30 years of active service. Thus he obviously meets the requirement of actual service to entitle him to the maximum pay of his grade.

The Department of the Army has recognized plaintiff's active military service in excess of 30

years by granting him the maximum retired pay for his grade; *i. e.*, $544.64 per month. Therefore, plaintiff's motion to amend his petition to allege more than 30 years of military service should be granted.

The sole question then is whether plaintiff's military service in excess of 30 years and one day can be used in computing his civil service annuity. This and all other questions raised by the defendant were considered by the court and answered in the *Prentiss* case, *supra.* A reconsideration of those questions leads us to the same conclusion, and on the basis of our decision in the *Prentiss* case, plaintiff's motion to amend his petition is granted, his motion for summary judgment is granted, and defendant's cross motion for summary judgment is denied.

Entry of judgment will be suspended pending the filing of a report by the General Accounting Office showing the amount due plaintiff.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Chief Judge,* dissenting:

I dissent for the reasons stated in my dissenting opinion in *Prentiss* v. *United States,* 123 C. Cls. 225, 230.

ORDER OF THE COURT ON MOTIONS FOR NEW TRIAL

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this Court and, on consideration thereof,

It is ordered this thirty-first day of January, 1956, that said motions be and the same are overruled as follows:

* * * * *

390–54 Aubrey H. Bond. Defendant's motion.

* * * * *

By the COURT.

[s] Marvin Jones,
MARVIN JONES,
Chief Judge.

In the United States Court of Claims

No. 390–54

AUBREY H. BOND

v.

THE UNITED STATES

ORDER

On November 8, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a report by the General Accounting Office showing the amount due plaintiff in accordance with the opinion of the court.

On December 22, 1955, said report was filed by the General Accounting Office in which it is shown that there is due plaintiff through February 29, 1956, the sum of $1,169.20.

Now, therefore, it is ordered this sixth day of March, 1956, that judgment be and the same is entered for plaintiff in the sum of one thousand

one hundred and sixty-nine dollars and twenty cents ($1,169.20).

By the COURT.

MARVIN JONES,
Chief Judge.

In the United States Court of Claims

No. 103–52

(Decided July 15, 1952)

AUGUSTIN M. PRENTISS

v.

THE UNITED STATES

Mr. Augustin M. Prentiss, pro se.

Mr. Gordon F. Harrision, with whom was *Mr. Assistant Attorney General Holmes Baldridge,* for defendant.

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff served in the classified civil service of the United States for seven years, four months and three days, from July 1, 1906 to November 3, 1913. He then served as a commissioned officer in the Army for thirty-two years, nine months and twenty-seven days, from November 4, 1913 to August 31, 1946. On the latter date he was retired from active military service,

at his own request, under the provisions of Section 5 of the Act of July 31, 1935, as amended by Section 3 of the Act of June 13, 1940. He is receiving military retired pay based upon the first thirty years of his military service. He sues for retirement benefits under the provisions of the Civil Service Retirement Act for the additional 10 years and two months of time during which he served the United States, for more than seven years as a civil servant, and more than two years as a soldier after the completion of the thirty years on which his military retired pay is based. The plaintiff applied to the Civil Service Commission for the retirement benefits for which he sues here, and was denied them.

The Civil Service Retirement Act, approved May 22, 1920, 41 Stat. 614, and its numerous amendments now collected in Title 5, U. S. Code, Sections 691 to 740a, is the controlling legislation.

The Government urges that the plaintiff never became eligible for benefits under the Civil Service Retirement Act, since the plaintiff's employment in the Civil Service terminated in 1913, and the Civil Service Retirement Act was not enacted until 1920, and did not confer rights upon persons who had no civil service employment after its enactment. The plaintiff urges that his military service from 1943 to 1946, which did not count toward his military retirement pay, made him eligible. If the plaintiff was otherwise eligible, there is no doubt that his extra military service should be included in computing what his Civil

Service Retirement benefits should be. Section 5 of the statute, 5 U. S. C. 707 says:

> Subject to the provisions of Section 9 hereof, [5 U. S. C. 736b] the aggregate period of service which forms the basis for calculating the amount of any annuity provided in this Act shall be computed from the date of original employment * * * in the civil service of the United States * * * including * * * periods of honorable service in the Army * * * of the United States; in the case of an officer or employee, however, who is eligible for and receives retired pay on account of military or naval service, the period of service upon which such retired pay is based shall not be included * * *: *Provided,* That an officer or employee must have served for a total period of not less than five years exclusive of such military or naval service before he shall be eligible for annuity under this Act. * * *

The plaintiff also qualifies under the language above quoted, in that he had seven years of civilian service in addition to the military service which he seeks to include.

The fact that the plaintiff, if successful in this action, will draw both military retired pay and Civil Service Retirement benefits presents no difficulty. Section 5 further says:

> Nothing in this Act shall be construed so as to affect in any manner an officer's or employee's right to retired pay, pension, or compensation in addition to the annuity herein provided.

Plaintiff's civilian service before 1920 can, of course, be counted, if he is eligible at all for Civil Service Retirement benefits. Section 9 of the Act, 5 U. S. C. 736b, says, with respect to the requirement of deposits in the Civil Service Retirement Fund:

> * * * no deposit shall be required for any service rendered prior to August 1, 1920, or for periods of honorable service in the Army * * * of the United States.

The plaintiff's claim, then, is not vulnerable because he seeks to obtain Civil Service Retirement benefits when he is already enjoying military retired pay, nor because he seeks to count military service in computing Civil Service Retirement benefits, nor because he seeks to include civilian service antedating 1920 in computing such benefits. The Government, nevertheless, urges that the plaintiff must lose because, when he was a civilian employee from 1906 to 1913 there was no Civil Service Retirement Law, and during his military service from 1943 to 1946 he was ineligible for Civil Service Retirement benefits because Section 3 of the Act, 5 U. S. C. 693a says:

> This act shall not apply to any such officer and employee of the United States subject to another retirement system for officers and employees.

This provision does not disqualify a person who is "subject to another retirement system" in the sense that he is actually drawing military retired pay at the time of civilian employment. Our quotation above from Section 5 makes that plain. The Government's argument is then, that though

the plaintiff, if he had had civilian Government service after 1920, would have become a potential eligible for Civil Service Retirement benefits, and then could have counted his pre-1920 civilian employment and such of his military service as he did not count for military retired pay, he did not, by his excess military service become such a potential eligible. The plaintiff urges that the quoted language merely means that the Act should not apply to an officer or employee for or during the period upon which his military retired pay is based. He points out that the Act of January 24, 1942, 56 Stat. 13, enlarged the Civil Service Retirement Act, which had applied only to classified civil service employees and certain other enumerated groups, and made it apply to

> all officers and employees in or under the executive, judicial, and legislative branches of the United States Government.

The plaintiff urges, therefore, that his excess military service, not counted toward his military retired pay, was just as effective in putting him into the Civil Service Retirement eligible category as civilian service would have been.

Although the statutory ensemble is perplexing, we think the plaintiff is right. Since the excess military service and the pre-1920 civilian service could admittedly be counted for Civil Service Retirement benefits if the plaintiff had even the briefest period of post-1920 civilian employment, we do not see what purpose would be served by adopting the Government's construction of the language of Section 3 which, in its context, is ambiguous.

We compliment the plaintiff, who represented himself, upon his orderly and helpful brief.

While the plaintiff has not made a motion for a summary judgment, the facts are, apparently, undisputed, and the case is ripe for decision. The defendant's motion for summary judgment is denied. The plaintiff is entitled to recover. Entry of judgment will be suspended to await the filing of a report from the General Accounting Office showing the amount due.

It is so ordered.

HOWELL, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Chief Judge,* dissenting:

I agree that since plaintiff had sufficient military service he is entitled to retirement on the basis of such service.

I also agree that if in addition he had sufficient civilian service to entitled him to an annuity under the Civil Service Retirement Act he might also draw that benefit.

But I do not agree that he may draw military retirement on just enough military service to get his highest retirement, apply the excess military service to splice out and afford civilian retirement for which he could not otherwise qualify, and draw both on that basis.

Undoubtedly if he lacked sufficient civilian service to qualify for an annuity he might add any military service in order to make up his qualification for such annuity, provided he had not already had military retirement. I think the permission to use military service to supplement civilian service as set out in section 5 of the

Civil Service Retirement Act, 5 U. S. C. 707, was intended primarily to take care of civilian employees who might be temporarily called into military service during wartime, or who might have a term of military service which could be used to finish out the requirement for eligibility. But I do not believe it was the intention of the Congress that he might split up the term of his military service in order to qualify for both systems of retirement.

This conclusion is strengthened by the provisions of section 3 of the act, 5 U. S. C. 693a, which reads as follows:

> * * * this act shall not apply to any such officer or employee of the United States * * * subject to another retirement system for such officers and employees * * *.

I would grant defendant's motion to dismiss.

APPENDIX B

1. The Civil Service Retirement Act provided in pertinent part at the time of respondent's retirement in March, 1948:

> SEC. 3. (a) This Act shall apply to all officers and employees in or under the executive, judicial, and legislative branches of the United States Government, all elective and appointive officers in or under the said branches, and to all officers and employees of the municipal government of the District of Columbia: *Provided, however,* That this Act shall not apply to any such officer or employee of the United States or of the municipal government of the District of Columbia subject to another retirement system for such officers and employees of the said governments * * *.
>
> SEC. 5. (5 U. S. C. 707) Subject to the provisions of section 9 hereof, the aggregate period of service which forms the basis for calculating the amount of any annuity provided in this Act shall be computed from the date of original employment, whether as a classified or an unclassified officer or employee in the civil service of the United States, or in the service of the District of Columbia, including periods of service at different times and in one or more departments, branches, or independent offices, or the legislative branch of the Government, and also periods of service performed overseas under authority of the United States, and periods of honorable

service in the Army, Navy, Marine Corps, or Coast Guard of the United States; in the case of an officer or employee, however, who is eligible for and receives retired pay on account of military or naval service, the period of service upon which such retired pay is based shall not be included, except that in the case of an officer or employee who is eligible for and receives retired pay on account of a service-connected disability incurred in combat with an enemy of the United States or resulting from an explosion of an instrument of war, the period of the military service shall be included: *Provided,* That an officer or employee must have served for a total period of not less than five years exclusive of such military or naval service before he shall be eligible for annuity under this Act. Nothing in this Act shall be construed as to affect in any manner an officer's or employee's right to retired pay, pension, or compensation in addition to the annuity herein provided.

2. Section 511 of the Career Compensation Act of 1949, 63 Stat. 829, 37 U. S. C. 311, provides in pertinent part:

> SEC. 511. On and after the effective date of this section (1) members of the uniformed services heretofore retired for reasons other than for physical disability, (2) members heretofore transferred to the Fleet Reserve or the Fleet Marine Corps Reserve, and (3) members of the Army Nurse Corps or the Navy Nurse Corps heretofore retired under the Act of May 13, 1926 (44 Stat. 513), shall be entitled to receive retired pay, retirement pay, retainer pay, or equivalent pay, in the

amount whichever is the greater, computed by one of the following methods: (a) The monthly retired pay, retainer pay, or equivalent pay in the amount authorized for such members and former members by provisions of law in effect on the day immediately preceding the date of enactment of this Act, or (b) monthly retired pay, retirement pay, retainer pay, or equivalent pay equal to 2½ per centum of the monthly basic pay of the highest federally recognized rank, grade, or rating, whether under a permanent or temporary appointment, satisfactorily held, by such member or former member, as determined by the Secretary concerned, and which such member, former member, or person would be entitled to receive if serving on active duty in such rank, grade, or rating, multiplied by the number of years of active service creditable to him: *Provided,* That for the purpose of the computation of (b) above, fractions of one-half year or more of active service shall be counted as a whole year: *Provided further,* That in no case shall such retired pay, retainer pay, or equivalent pay exceed 75 per centum of the monthly basic pay upon which the computation is based: *Provided further,* That for the purposes of this section, the term "active service" as used herein shall mean all service as a member or as a former member of the uniformed services * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1951

MAY 1956
HAROLD B. WILLEY, Clerk

No. 909

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

The United States of America, Petitioner,

v.

Aubrey H. Bond

On Petition for a Writ of Certiorari to
The United States Court of Claims

BRIEF FOR RESPONDENT IN OPPOSITION

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Hartford 5, Connecticut
Counsel for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1955
No. 909

THE UNITED STATES, PETITIONER

v.

AUBREY H. BOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENT IN OPPOSITION

The United States seeks to have this Court review and reverse the judgment of the Court of Claims awarding an annuity of $22.00 per month, under the Civil Service Retirement Act, as amended, to the respondent, a 67-year-old retired Army officer with over 30 years of military service (1917-1948), and in addition nearly 6 years of United States civil service (1909-1915); on the ground that the Court of Claims erred in holding that respondent's Army service, in excess of the period of service on which his military retired pay is based, is service creditable toward an annuity, as required by Section 5 of that Act.

OPINION BELOW

The opinion of the Court of Claims in question here is reported at 135 F. Supp. 433, and is also set forth in full in Appendix A (pp. 23-34) of the Petition.

JURISDICTION

The jurisdiction of this Court is as stated in the Petition.

QUESTION PRESENTED

The single question presented is whether respondent's active Army service, in excess of 30 years (and 1 day), is a part of "the period of service upon which his military retired pay is based," within the meaning of these words in Section 5 (U.S.C. 707) of the Civil Service Retirement Act, as amended (see Appendix B, pp. 35 and 36 of the Petition).

Petitioner has misstated the question here presented by imply-

ing that respondent's non-contribution to the Civil Service Retirement Fund adversely affects his right to a Civil Service annuity, notwithstanding that petitioner admits (p. 3, fn. 1, of the Petition):

> "No deduction is required for services rendered prior to Aug. 1, 1920, or for periods of honorable service in the armed forces. Sec. 9 of the Act, 5 U.S.C. 736b."

STATUTES INVOLVED

The pertinent provisions of the Civil Service Retirement Act at the time of respondent's retirement in March 1948 (hereinafter referred to as the Act), and pertinent parts of Sec. 511 of the Career Compensation Act of 1949, are set forth in Appendix B (pp. 35-37) of the Petition. The following statutes are also indirectly involved, as will be shown hereinbelow:

(1) Sec. 3 of the original Civil Service Retirement Act of May 22, 1920 (41 Stat. 618).

(2) Sec. 5 of the Act of July [illegible], 1926, (44 Stat. 903).

(3) Sec. 3 of the Act of Jan. 24, 1942 (56 Stat. 15).

(4) Pay Readjustment Act of June 29, 1946 (37 U.S.C. 101).

(5) R.S. 1251.

(6) R.S. 1274.

STATEMENT

1. The statutory background.

a. Civil Service Retirement. Sec. 3 of the original Civil Service Retirement Act of May 22, 1920, which inaugurated the Civil Service Retirement System, provided in pertinent part as follows:

> "That for purposes of this Act ** the period of service shall be computed from the date of original employment ** and shall include ** honorable service in the Army ** Provided, That in the case of an employee who is eligible for and elects to receive a pension under any law, or compensation under the War Risk Insurance Act, the period of his or her military or naval service upon which such pension or compensation is based shall not be included ** but nothing contained in this Act shall be so construed as to affect in any manner his or her right to a pension, or to compensation under the War Risk Insurance Act, in addition to the annuity herein provided."

When the bill (S. 1699, 66th Congress, 2d Session; 59 Cong. Rec. 6296), which matured into the original Act of 1920, was considered on the floor of the House, Sec. 3 did not include the phrase under-

scored above; and in order to clarify the language of Sec. 3, an amendment was adopted which inserted said underscored phrase (59 Cong. Rec. 6363-6365), and thus made certain that only the portion of an employee's military service upon which his pension or compensation is based shall not be included in the period of service credited toward an annuity. The text of the amendment and pertinent extracts from the debate on it are attached hereto as Appendix A, (pp. 18-20, infra). This record shows the clear intent of Congress, that an employee's military service should not be considered as a whole, but, on the contrary, credit toward a civil service annuity should be allowed for any part of an employee's military service for which he did not receive a pension or retirement compensation.

Again, when Congress amended the original Civil Service Retirement Act of 1920 by the Act of July 3, 1926 (44 Stat. 903, 907), it extended the above-mentioned credit of service for an annuity to include "retired pay," by inserting those words after the word "pension" in the above underscored phrase of Sec. 3, and further amended the last clause of this provision to read as follows:

> "but nothing in this Act shall be so construed as to affect in any manner his or her right to a pension, or to retired pay, or to compensation under the War Risk Insurance Act in addition to the annuity herein provided."

The text of Sec. 5 of the Act, as amended by the Act of July 3, 1926, is attached hereto as Exhibit B, (p. 21, infra).

The Act of Jan. 24, 1942 (56 Stat. 13) further amended Sec. 3 of the Civil Service Retirement Act of May 29, 1930 (46 Stat. 408), which had theretofore limited its application to certain specified categories of civil service employees, by striking out all of Sec. 3 and inserting in lieu thereof a new paragraph which provided, in pertinent part, as follows:

> "(a) This Act shall apply to all officers and employees ** of the United States Government, ** Provided, however, That this Act shall not apply to any such officer or employee ** subject to another retirement system ** Provided further, That this Act shall not apply to any elective officer or to any officer or employee in the legislative branch of the Government"

By this amendment, which is now a part of the Act, Congress

expressly extended the Civil Service Retirement System to cover:

> "all officers and employees of the United States Government except those subject to another retirement system for such officers and employees."

It is to be particularly noted that the only classes of persons who are specifically excepted from the coverage of the Act are "elective officers and (certain) officers and employees in the legislative branch of the Government." Yet petitioner contends that retired military personnel are excluded because they are "subject to another retirement system." Such contention is not only contrary to the express provisions of Sec. 5 of the Act, but if valid, would exclude from the annuity benefits of the Act thousands of civil service employees who are retired military personnel and are receiving retired pay for their military service, since all such personnel would be just as much "subject to another retirement system," as respondent.

In order to insure that the Act could not be construed as petitioner contends, Sec. 5 of the Act specifically provides:

> "Nothing in this Act shall be construed as to affect in any manner an officer's or employee's right to retired pay, pension, or compensation, in addition to the annuity herein provided."

Recognizing that it was never the intent of Congress to exclude retired military personnel from the annuity benefits of the Act on the ground that they are -- "subject to another retirement system," as contended by petitioner, the Civil Service Commission, since the inception of the Civil Service Retirement System, has always granted annuities to employees who are retired military personnel and receive retired pay for their military service, provided they had over 5 years of civil service and separated from the Civil Service after August 1, 1920. Respondent's annuity was denied only on the grounds that his civil service was prior to 1920, notwithstanding that he had military service equally creditable toward an annuity subsequent to 1920.

Referring to this situation, the court below, in its earlier decision in Prentiss v. United States, 123 C. Cls. 225 (Appendix A, pp. 28-34 of the Petition), said:

"Since the excess military service and the pre-1920 civilian service could admittedly be counted for Civil Service Retirement benefits if the plaintiff had even the briefest period of post-1920 civilian employment, we do not see what purpose would be served by adopting the Government's construction of the language of Section 3 **"

b. Military Retirement. Respondent was retired from active military service on March 31, 1946, on account of service-incurred disability, under the provisions of Sec. 1251 R.S., and his retired pay was determined by the governing provisions of the Pay Readjustment Act of June 29, 1946 (37 U.S.C. 101), and R.S. 1274.

Pursuant to the provisions of the Career Compensation Act of 1949 (63 Stat. 802), which superseded the Pay Readjustment Act of 1946 (37 U.S.C. 101), respondent elected to have his retired pay computed pursuant to the second option of Section 511 of that Act (63 Stat. 829, 37 U.S.C. 311), as set forth in Appendix B (pp. 36 and 37) of the Petition, which provides in pertinent part, as follows:

"(b) Monthly retired pay equal to 2½ per centum of monthly basic pay of ** rank ** held ** such person would be entitled to receive if serving on active duty in such rank ** multiplied by the number of years of active service creditable to him: Provided, That for the purpose of the computation of (b) above, fractions of one-half year or more of active service shall be counted as a whole year: Provided further, That in no case shall such retired pay ** exceed 75 per centum of the monthly basic pay upon which the computation is based."

Since respondent had a total of 30 years, 5 months and 8 days of active military service and fractions of a year are not counted for retired pay, it follows that "the number of years creditable to him" is exactly 30. The same result would obtain, even if respondent had had any number of years of active service in excess of 30, since the statute also provides that in no case shall such retired pay exceed 75 per cent of the monthly basic pay upon which the computation is based; and 75 per cent, divided by 2½ for each year of service, gives 30 years as the maximum period of service on which retired pay can be based.

It is here to be further noted that substantially the same result would obtain, even if the percentage of retired pay were any fixed percentage other than 75 per cent; that is to say, an Army officer's maximum retired pay is based upon the first 30 years (and

1 day) of his active service, by reason of the method of computing his active pay, prescribed by Sec. 201, Career Compensation Act, as amended, (63 Stat. 805; 66 Stat. 79; 37 U.S.C. 232a), as shown in the military Pay Table in Appendix C (p. 22 infra). Thus, it will be noted from an inspection of the table in Appendix C that an officer's pay depends upon two independent factors, viz: Grade and Years of Service; and the table consists of 8 grades (O-1 to O-8) and 13 successive periods of service ("under 2" to "over 30" years). Since an officer becomes entitled to the highest pay of his grade on the first day following the completion of his 30th year of service (Lambert v. United States, 121, C. Cls. 333), regardless of what grade he occupies at that time, it follows that his pay reaches a maximum upon the completion of 30 years and 1 day of service. This being the case, it is clear that his active pay (and therefore retired pay as any fixed percentage) is based upon the first 30 years and 1 day of his active service, and any service in excess of 30 years and 1 day is obviously not a part of -- "the period of his military service upon which such retired pay is based," within the meaning of these words in Sec. 5 of the Civil Service Retirement Act, as amended.

Finally, it is also to be noted that if an officer is promoted from colonel (grade O-6) to Brig. Gen. (grade O-7) after completing 30 years and 1 day service, this does not change the "period of his military service upon which such retired pay is based," since grade and period of service are completely independent factors of the military pay table.

From the foregoing, it follows that respondent's 5 months and 7 days of military service, in excess of 30 years and 1 day, as well as his 5 years, 11 months and 24 days of prior civil service, are both clearly creditable toward a civil service annuity, in accordance with Sec. 5 of the Act. This is the basis of respondent's claim which was allowed by the Court of Claims.

2. The Facts

Respondent agrees with petitioner's statement of the facts of this case, as set forth on page 6 of the Petition, except the allega-

tion that 30 years was the length of respondent's entire active service. Factually, respondent's entire active service was 30 years, 5 months and 8 days, notwithstanding that his service in excess of 30 years (and 1 day) does not count in determining his military retired pay.

3. The Pleadings

Petitioner has seriously misstated the pleadings in this case, as set forth on pages 7 and 8 of the Petition, in respect to the following points:

(1) Petitioner's reference to respondent's non-contribution to the Civil Service Retirement Fund, as having any bearing on the issues of this case, since Sec. 9 of the Act (5 U.S.C. 736b) specifically provides that no deduction is required for civil service rendered prior to August 1, 1920, or for honorable service in the armed forces, on which respondent's claim is based, as petitioner admits, in fn. 1, p. 3 of the Petition.

(2) Petitioner alleges that respondent's "contention was that since his military retirement benefits did not increase after he had served for thirty years and a day, his subsequent military service was not 'subject to the military retirement system'".

Respondent does not, and did not, contend that his military service in excess of 30 years and 1 day was not "subject to the military retirement system," as alleged by petitioner (p. 7 of Petition). On the contrary, the position of respondent and the lower court is, and has always been, that the first proviso of Sec. 3 of the Act, does not disqualify for an annuity a civil service employee, as one "subject to another retirement system," because he is actually drawing military retired pay for prior military service, since the provision of Sec. 5 of the Act (quoted on page 4 above) makes this clearly not the case.

(3) Petitioner's contention (p. 8 of Petition) "that Congress intended to cover career military service exclusively by the military retirement system," is not only directly contrary to the express provisions of Sec. 5 of the Act, but is also contrary to

the clear intent of Congress to credit for an annuity any period of military service on which military retired pay is not based; for reasons set forth on page 2-6, supra.

4. The decision below.

In commenting on the decision of the court below, petitioner refers to that Court's earlier decision in Prentiss v. United States, 123 C. Cls., (Appendix A, pp. 28-34 of Petition) and states (p. 8, fn. 9, of Petition):

> "We did not apply for a writ of certiorari in Prentiss mainly because, in our view, the issues had not been thoroughly enough presented to the Court of Claims in that case."

With regard to petitioner's alleged reason for not applying for a writ of certiorari in the Prentiss case, respondent points out that petitioner's attorney twice presented his case in the Prentiss' suit at great length; first, in his brief and oral argument in support of his motion to dismiss Prentiss' petition, and again in a lengthy brief in support of his motion for a new trial. The fact that petitioner did not apply for a writ of certiorari in Prentiss, while it now seeks such writ in the instant case, which admittedly involves a similar situation, points strongly to the conclusion that the real reason for petitioner's present action is because of a recent decision of the U.S. Court of Appeals for the Fourth Circuit, in Moncrief v. Folsom, C.A. 4 No. 7112, (decided April 9, 1956), which involved an entirely extraneous issue, not mentioned at all in the court below, and which petitioner now attempts to inject into the instant case, to show that the decision of the lower court has application beyond the purview of the Civil Service Retirement system.

However, as the record clearly shows, the issue in the present case is specific, and clearly does not extend beyond the ambit of the Civil Service Retirement Act and the Career Compensation Act of 1949, as set forth in Appendix B of the Petition).

REASONS FOR OPPOSING THE WRIT

I

The Decision Below is Right

The decision of the court below is clearly right, reflecting the intent of Congress, expressed in the Civil Service Retirement Act, as amended, to credit toward an annuity an employee's military

service in excess of the period upon which his military retired pay is based, where such employee also has over 5 years of civil service, as in the instant case. Even if the decision might be wrong according to some high refined and technical view of the law, it is of insufficient moment to require the Court to correct it. It applies to one officer and can serve as a precedent for only a fast-dwindling handful of officers with similar service in the far distant years from 1900-1920.

Thus, in order for anyone to come within the ambit of the decision of the court below, he must have had over 5 years of United States civil service prior to 1920, and in addition over 30 years of subsequent military service before his retirement from active service; and such retirement must have occurred subsequent to May 1950 (to avoid the statute of limitations) and prior to August 31, 1954, when the Act of August 31, 1954 (68 Stat. 1004), amending Sec. 5 of the Act (5 U.S.C. 707) set up a new requirement for eligibility for annuity, viz: at least one year of creditable civilian service within the two year period immediately preceding retirement.

It is thus obvious that extremely few persons can meet all of these rigid requirements. In fact, according to petitioner's statement (p. 19 of Petition) only seven claims similar to that of respondent have been presented to the Civil Service Commission in over 14 years since the Act of January 24, 1942, made such claims possible. In the 4 years remaining in which such claims can be presented, it is highly improbable that the total number of such claims can be materially increased over the 7 now pending.

Among the reasons advanced by petitioner for granting the writ, he again refers (p. 8 of Petition) to respondent's non-contribution to the Civil Service Retirement Fund, completely ignoring the fact that Sec. 9 of the Act specifically provides that no such contribution is required for civilian service rendered prior to August 1, 1920, or for periods of honorable service in the armed forces, on which respondent's claim was based. See p. 3, fn. 1 of Petition.

Petitioner next objects (on p. 8 of Petition) to respondent's "using the period of service, in excess of that needed to qualify" for military retired pay, in combination with his previous civil service, again ignoring the express provisions of Sec. 5 of the Act, which specifically states that both such categories of service are creditable toward an annuity.

II

There is No Conflict of Decision

On page 9 of the Petition, petitioner refers to the case of Moncrief v. Folsom (C.A. 4, No. 7112) to support his statement that-

> "the rationale of the lower court's decision in the case at bar can be applied to other military personnel, as well as to temporary federal employees who have been subject to the Social Security System and do not contribute to the Civil Service Retirement Fund."

It is significant that petitioner makes no attempt to identify the "other military personnel" to which he here refers, or to show how the decision of the court below in the instant case can be applied to the temporary federal employees he mentions.

Contrary to petitioner's implications, a study of the Moncrief case, cited, makes it clear that there is no conflict between that decision and the decision of the Court of Claims in the case at bar, because the pertinent provisions of the controlling statutes in the two cases are entirely different. Thus, in Moncrief the court decided against plaintiff because the controlling statute (Social Security Act, 42 U.S.C. 417) contains a specific provision (in subsection 417 (e) (1) (B)) that the benefit claimed by plaintiff under the provisions of 42 U.S.C. 417 (e) (1), shall not be applicable if a benefit, which is based, in whole or in part, upon active service between July 25, 1947 and January 1, 1954, is determined by any agency of the United States to be payable by it under any other law of the United States. The plaintiff had received such a benefit in the shape of monthly retainer pay upon a determination of the Navy under 34 U.S.C. Sec. 854(c) from the date of his retirement on November 18, 1949, until he was recalled in active service on April 12, 1951. Since this retirement pay had been based in part upon

his active service from July 25, 1947 to November 18, 1949, and this period was part of the exclusionary period from July 25, 1947 to January 1, 1954, as above set out, the Social Security Administration rejected the claim.

In order for plaintiff to prevail in the Moncrief case, it would have been necessary for the Court to read into the Statute the words "same period of," so that in this respect, the section would read:

> "(B) a benefit ** which is based in whole or in part, upon the same period of active military or naval service of such veteran on or after July 25, 1947, and prior to Jan. 1, 1954."

Since the addition of the words "same period of" would impair the scope of the limiting words "in whole or in part" in the Social Security Act, the court held that such a construction of the statute was unwarranted.

The beneficial rights of those who are subject to the Social Security Act are governed by the specific provisions of that Act, and the beneficial rights of federal employees (whether or not they have contributed to the Civil Service Retirement Fund) are similarly governed by the specific provisions of the Civil Service Retirement Act. Accordingly, any claims for benefits under either Act must be determined in accordance with the controlling provisions of the applicable act, with respect to the particular circumstances of each claimant. The decision of the Court of Claims in the case at bar could not possibly have any application to any claimant, unless he also had over 5 years civil service and, in addition, military service in excess of the period of service upon which his military retired pay is based. In such a case, his claim does not involve the Social Security Act at all.

In view of the foregoing, it is clear that none of the underlying considerations upon which the Court based its decision in the Moncrief case were present in the case at bar, and vice versa; hence, there is no conflict between the decisions of the courts below in the two cases.

Petitioner next refers (pp. 10, 11 of Petition) to Olney v. United States, 123, C. Cls. 285, which was decided on the same day as the Prentiss case, cited above, so that it is obvious that the Court of Claims, having both cases under consideration at the same time, found sufficient difference in their merits to warrant a favorable decision in Prentiss and an adverse decision in Olney. The fatal defect of Olney's case was that there was no specific statutory basis for crediting Olney's claimed service, as is found in Sec. 5 of the Civil Service Retirement Act, for Prentiss' service.

On page 11 of the Petition, petitioner again argues that since respondent is a beneficiary of the military retirement system he is "subject to another retirement system," and therefore his military service is in no way covered by the Civil Service Retirement System. Here again, petitioner completely ignores the fact that if respondent is not covered by the Act, then the thousands of government civilian employees who are drawing military retired pay, are equally not covered by the Civil Service Retirement System. But this is not only contrary to the express provisions of Sec. 5 of the Act, but is also completely at variance with the "facts of life," as regards said civilian employees who have always been treated by the Civil Service Commission as covered by the Act, if they separated from the service after Aug. 1, 1920. See the Court of Claims opinion on this point, as quoted on page 5 above, and more fully discussed in Appendix A, (pp. 23-34) of Petition.

On page 12 of Petition, petitioner refers to the amendatory Act of Jan. 24, 1942 (56 Stat. 15) and attempts to make it appear that congress intended to distinguish between so-called "career" and other military personnel in enacting the 1942 Act. However, there is not an iota of evidence in the legislative history of the said 1942 Act which gives any support to petitioner's argument on this point.

Petitioner's argument (pp. 12, 13 of Petition) that Army and Navy officers are not under the Civil Service Retirement System is

equally irrelevant, because respondent's suit in the court below was not based upon the contention that military personnel, as such, were covered by the Civil Service Retirement Act. Since Sec. 5 of the Act specifically requires, as one of the prerequisites for eligibility for an annuity, service of "not less than five years, exclusive of such military or naval service," it is obvious that no amount of military or naval service alone can qualify an individual for an annuity. If, in addition to at least 5 years of civil service, an individual also has military service in excess of that upon which his military retired pay is based, Sec. 5 of the Act also specifically provides that such excess military service shall be included in the aggregate period of service which forms the basis for calculating the amount of any annuity provided in this Act." Inasmuch as military service, on which military retired pay is not based, and civil service are equally credited towards an annuity under Section 5 of the Act, such military service of respondent "was just as effective in putting him into the Civil Service Retirement eligible category as civilian service would have been" -- as was held by the court below.

On pages 13 and 14 of the Petition, petitioner alleges that respondent's position, that his military retired pay is not based upon the entire period of his military service, but only on the first 30 years and 1 day, is in direct conflict with the statutory language of Section 511 of the Career Compensation Act. It is to be particularly noted, however, that petitioner does not quote the language of Sec. 511 which he says conflicts with respondent's position.

The pertinent portion of Section 511 provides:

> "monthly retired pay ** equal to 2½ per centum of the monthly basic pay of the highest ** grade ** held ** multiplied by the number of years of active service creditable to him."

It is to be noted that the quoted provision of the Statute does not say that the 2½ per centum is to be multiplied by the total period of an officer's active service (as contended by petitioner) but only "the number of years creditable to him." And since Sec. 511 also specifically provides:

"fractions of one-half year or more of active service shall be counted as a whole year."

-- fractions of a year less than one-half year are not counted. Accordingly, of respondent's total period of active service of 30 years, 5 months and 8 days, only the first 30 years are "creditable to him," as the multiple of the 2½ per centum of Sec. 511.

Equally erroneous and misleading is petitioner's statement (p. 14 of Petition):

"'active service' means 'all service as a member or as a former member of the uniformed service.'"

In the first place, the purpose of the proviso of Sec. 511, defining the term "active service," is clearly shown by the enumeration of all the different kinds of active service that are creditable for the purpose of computing retired pay, in the language of Sec. 511 which immediately follows the clause just quoted above, but which petitioner is careful not to include in his quoted extracts from Sec. 511.

Secondly, Sec. 511 does not say that the total period of "active service," as that term is there defined, is to be used as the multiple of the 2½ per centum of Sec. 511, but as pointed out above, said section specifically states that the 2½ per centum is to be multiplied "by the number of years of active service creditable to him."

The number of years creditable to an officer, under Sec. 511, can never exceed 30, not only on account of the 75 per cent ceiling placed on the maximum retired pay, but also because the tabulation of "pay grades" and "cumulated years of service" prescribed by the Career Compensation Act (37 U.S.C. 232) shows that the maximum basic pay of each grade is attained immediately upon completion of the first 30 years (and 1 day) of active service; and no amount of active service beyond 30 years (and 1 day) has any effect upon the amount of his retired pay. See military Pay Table in Appendix C, infra, p.22.

On page 19 of the Petition, petitioner says:

"the principle, squarely accepted by the Court of Claims, that a period of service is not covered by a retirement system unless as a matter of fact it increases the officers' benefits, has wide-ranging potentialities for all career military personnel."

The decision of the court below was not to the effect that "a period of service is not covered by a retirement system unless it increases the officers' benefit," as is here alleged by petitioner. On the contrary, the lower court in the instant case held that since Sec. 5 of the Act specifically provides:

> "the period of service upon which such retired pay is based shall not be included"

in determining the annuity provided in this Act, a distinction must be made between "the period of service upon which such retired pay is based" and the total period of active military service, in determining an employee's annuity rights under the Act.

This distinction is essential because Sec. 5 of the Act requires that all military service be credited towards an annuity, except "the period of service upon which retired pay is based."

As was shown on pages 2-6, supra, the statutory background of the Act clearly shows that Congress amended the original draft of the Act of 1920, so as to insure that, because a Government employee is drawing a pension, or retired pay, for prior military service, he will not be denied credit toward an annuity for that part of his prior military service upon which his pension or retired pay is not based. See Appendix A (pp. 18-20, infra).

Since the Civil Service Retirement Act is limited in its application to Government employees who have had at least five years of Civil Service, it is obvious that the benefits provided by said Act cannot possibly have any "wide-ranging potentiality for all career military personnel," as alleged by petitioner. On the contrary, no military personnel (career or other) can possibly come within the purview of the Act unless they have had not less than 5 years of Civil Service, and also military service upon which their military retired pay is not based, as in respondent's case.

On page 20 of the Petition, petitioner says:

> "It may be argued with the logic of the ruling below that a temporary government employee who has more than 40 quarters of social security coverage, and who earns more than $4,200 per annum, is no longer subject to the Social Security Act, and is thus entitled to civil service retirement benefits."

The complete lack of logic in the quoted contention is manifested by the totally different provisions of the Social Security Act (42 U.S.C. 414, 415), as compared with the Civil Service Retirement Act and the Career Compensation Act. Thus, under the Social Security Act, while coverage is obtained by the payment of 40 quarters of the prescribed deposits, that act also requires continued payments of deposits beyond said 40 quarters, so long as the employee is gainfully employed, within the prescribed rates of compensation. Hence, such employee is continuously subject to the Social Security Act through the whole period of his employment during which he is required to make quarterly payments.

For petitioner's above-quoted contention to be valid would require that Sec. 5 of the Civil Service Retirement Act include a provision to the effect that service of a Government employee, except the period required to attain coverage under the Social Security Act, is creditable towards a civil service annuity; corresponding to the present provision in Sec. 5 of the Civil Service Retirement Act which expressly credits toward an annuity all military service, except the period upon which an employee's military retired pay is based. But there is no such provision in the Civil Service Retirement Act, and such a provision cannot be spelled out of the lower court's decision in the instant case, which is restricted to <u>military</u> service beyond the period upon which military retired pay is based.

With regard to petitioner's reference (p. 20 of Petition) to temporary government employees, who are World War II and Korean veterans, combining their military and civilian Government Service to secure a civil service annuity, respondent points out that such action, is now, and always has been, permissible, under the operation of the Civil Service Retirement Act since its inception in 1920, provided they have a minimum of 5 years civilian service and military service on which their military retired pay is not based. And this is true without any regard to the decision of the lower court in the

the instant case. Of course, such employees cannot obtain the benefits of both the Social Security Act and the Civil Service Retirement Act for the same period of service; any more than any Government employee can count the period of his military service upon which his military retired pay is based toward an annuity.

From what has been shown above, it is clear that the rationale of the Court of Claims opinion in the instant case in no way affords any support for such unfounded claims as are discussed by petitioner on pages 19 and 20 of the Petition.

III

The Decision Presents No Issue of General Importance

The case herein is one of simple construction of the Civil Service Retirement Act and the Career Compensation Act. Only one officer is directly involved, and the importance of the decision even to him is declining as his life is drawing to its close. For reasons stated on pages 8 and 9, supra, the total number of persons who could possibly benefit from the decision cannot exceed a mere handful.

The petitioner closes with an appeal to the Court to consider the "broader consequences" of the decision, but as respondent has shown hereinabove (pp. 15 - 17, supra), these "consequences" are merely the figments of petitioner's imagination, and have no realistic, factual or legal support in the decision of this case. The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

CONCLUSION

For the reasons advanced hereinabove, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Augustin M. Prentiss
Counsel for Respondent

Hartford, Connecticut
May 14, 1956

APPENDIX A

The following excerpts from the Congressional Record (59 Cong. Rec. 6296, and 6363-6364) give an explanation of Sec. 3 of the original Civil Service Retirement Act of 1920, during its consideration on the floor of the House of Representatives, and its amendment, in respect to credit for military service. (R. 66).

Sec. 3 gives the employee the benefit of all periods of service for the purpose of assignment to classes defined in section 2. If the employee is in receipt of a pension or compensation on account of military or naval service, the period of his or her service in the Army or Navy shall not be included for the purpose of assignment to classes; in the event, however, that such employee is not in receipt of a pension or compensation for such service, then the period of military or naval service may be included. This means, in effect, that the retired employee may receive an annuity in addition to a pension or compensation, but the period of military or naval service in such cases shall be eliminated for the purpose of computing annuity.

Mr. Lehlbach. Mr. Chairman, I offer an amendment.

The Chairman. The gentleman from New Jersey offers an amendment, which the Clerk will report.

The Clerk read as follows:

Committee amendment: Page 6, line 19, after the word "service," insert the words "upon which such pension or compensation is based."

Mr. Lehlbach. Mr. Chairman, the purpose of the amendment is simply to clarify the meaning and to render certain what was intended by this proviso.

The provisions of this section are that in computing the length of service on which the retirement annuity is to be based all service for the United States, including military and naval service, shall be added in, but if based on that military or naval service a pension or compensation is being received from the Government, that period upon which the pension or compensation is based would not also be included in figuring what civil pension or retirement the individual is to receive.

Now, it has been suggested that possibly all military or naval service would be treated as an entity and not as different periods considered as separate. A situation might arise like this, that a Civil War veteran having served in the Civil War may be drawing a pension, and he may subsequently be employed in substantially a civil capacity, but theoretically and technically in the Army, under the Act of 1886, which provides for the enlistment of general-service clerks who perform clerical service; and if it be construed that the military service be considered as a whole, because a man is drawing a pension based on his war service in the Civil War, you will not be entitled to add in his service as a clerk subsequent to and in accordance with the Act of 1886. That, of course, is manifestly not the intention. It is to clarify that that (sic) amendment is offered.

Mr. Gard. Mr. Chairman, will the gentleman yield?

The Chairman. Does the gentleman from New Jersey yield to the gentleman from Ohio?

Mr. Lehlbach. Yes.

Mr. Gard. I did not catch the gentleman's amendment. Will he kindly advise me what it is?

Mr. Lehlbach. In line 19, page 6, where it says the period of his military or naval service shall not be included, after the word "service" are inserted the words "upon which such pension or compensation is based," so that it will read, "the period of his or her military or naval service upon which such pension or compensation is based shall not be included," so that if a man subsequently serves in what is construed to be a military or naval capacity, the service outside of that service upon which the pension is based shall not be excluded.

Mr. Bee. Let me suggest to the gentleman from New Jersey that a general-service clerk is an enlisted man under the law.

Mr. Lehlbach. Yes.

Mr. Bee. And, although he renders no military service, yet his time is running on in the service of the United States.

Mr. Lehlbach. And such time so running is included in the computation of the service. Otherwise this other service to the Government is entitled to be added in. If he was a Civil War veteran, he could not include that Civil War service, but he ought not to be debarred from including the other clerical service.

APPENDIX B

Section 5 of the Civil Service Retirement Act of 1920, as amended by the Act of July 3, 1926 (44 Stat. 903, 907), reads as follows: (R.69)

"COMPUTATION OF ACCREDITED SERVICE"

"Sec. 5. Subject to the provisions of section 9 hereof, the aggregate period of service which forms the basis for calculating the amount of any benefit provided in this Act shall be computed from the date of original employment, whether as a classified or an unclassified employee in the civil service of the United States, including periods of service at different times and in one or more departments, branches, or independent offices of the Government, and also periods of service performed overseas under authority of the United States, and periods of honorable service in the Army, Navy, Marine Corps, or Coast Guard of the United States; in the case of an employee, however, who is eligible for and elects to receive a pension under any law, or retired pay on account of military or naval service, or compensation under the War Risk Insurance Act, the period of his military or naval service upon which such pension, retired pay, or compensation is based shall not be included, but nothing in this Act shall be so construed as to affect in any manner his or her right to a pension, or to retired pay, or to compensation under the War Risk Insurance Act in addition to the annuity herein provided.

"In computing length of service for the purposes of this Act all periods of separation from the service, and so much of any leaves of absence as may exceed six months in the aggregate in any calendar year, shall be excluded, and in the case of substitutes in the Postal Service credit shall be given from date of original appointment as a substitute.

"In determining the aggregate period of service upon which the annuity is to be based, the fractional part of a month, if any, in the total service shall be eliminated."

APPENDIX C

United States Code, Title 37, §232. Basic pay -- Pay grades and monthly basic pay.
(a) For the purpose of computing the basic pay of members of the uniformed services, pay grades are prescribed and monthly basic pay for such members is established within each pay grade according to cumulative years of service, as follows: (R.64)

COMMISSIONED OFFICERS

Pay Grade	Under 2	Over 2	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18	Over 22	Over 26	Over 30
O-8	$963.30	$963.30	$963.30	$963.30	$963.30	$963.30	$963.30	$963.30	$963.30	$963.30	$963.30	$963.30	$992.94
O-7	800.28	800.28	800.28	800.28	800.28	800.28	800.28	800.28	800.28	800.28	800.28	829.92	859.56
O-6	592.80	592.80	592.80	592.80	592.80	592.80	592.80	592.80	607.62	637.26	666.90	696.54	726.18
O-5	474.24	474.24	474.24	474.24	474.24	474.24	489.06	503.88	518.70	548.34	577.98	607.62	607.62
O-4	400.14	400.14	400.14	400.14	414.96	429.78	444.60	459.42	474.24	503.88	518.70	533.52	533.52
O-3	326.04	326.04	340.86	355.68	370.50	385.32	400.14	414.96	429.78	444.60	459.42	459.42	459.42
O-2	259.36	274.18	289.00	303.82	318.64	333.46	348.28	363.10	363.10	363.10	363.10	363.10	363.10
O-1	222.30	237.12	251.94	266.76	281.58	296.40	311.22	326.04	326.04	326.04	326.04	326.04	326.04

WARRANT OFFICERS

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ENLISTED PERSONS

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